United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7567

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
P/S

THOMAS W. EGGERT

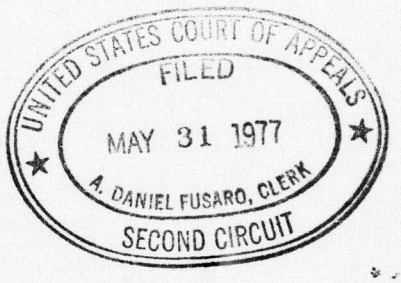
Plaintiff-Appellant

vs.

NORFOLK & WESTERN RAILWAY COMPANY
ERIE LACKAWANNA RAILWAY COMPANY

Defendants-Appellees

BRIEF FOR DEFENDANTS-APPELLEES



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THOMAS W. EGGERT

No. 76-7567

Plaintiff-Appellant

-vs-

NORFOLK & WESTERN RAILWAY COMPANY
ERIE LACKAWANNA RAILWAY COMPANY

Defendants-Appellees

BRIEF FOR DEFENDANTS-APPELLEES

Nature of the Case

This appeal arises from the entry of a judgment on the verdict of a jury after the retrial of this action in the United States District Court for the Western District of New York in the case of Thomas W. Eggert v. Norfolk & Western Railway Company and Erie Lackawanna Railway Company, Civil No. 1973-370.

Plaintiff brought a claim seeking damages allegedly resulting from the defendants' violation of the Federal Employers Liability Act and the Boiler Inspection Act. The first trial of this action resulted in a directed verdict in favor of the defendants. Plaintiff then appealed from the order and judgment granting the defendants' motion for a directed verdict, and on appeal, the directed verdict was reversed and the matter was remanded for a new trial. Following the retrial of this action, the jury returned a verdict which found no cause of

action for negligence and no violation of the Boiler Inspection Act. Plaintiff then brought this appeal.

Statement of Facts

The plaintiff-appellant was an engineer on the Erie Lackawanna Railway and was allegedly injured while working in the cab of a Norfolk & Western Railway engine, No. 2500, on June 22, 1971 at or about 2:30 a.m. Plaintiff was performing the duties of a fireman at the time of the alleged incident.

According to the version of the incident given at the retrial, plaintiff testified that he got up to move from the front seat to the rear seat in the cab of the Norfolk & Western Railway engine when the force of the slack action coming in caused him to lose his balance and fall (121a ll. 5-12; 187a ll. 20-25). At the time that plaintiff got up to move to the rear seat, the fireman operating the engine, Mr. Kendall, had throttled down the engine (118a ll. 24-25). The slack action came in as a result of the deceleration of the engine (120a l. 17 - 121a l. 6). Plaintiff was aware of the deceleration of the engine and the slack coming in at the time that he attempted to move from the front to the rear seat.

During the course of the trial, plaintiff was permitted to put photographs of other engines into evidence to show the positioning of the seats, brake valves and windows in typical railroad engines. See plaintiff's Exhibits 3 and 26 (Norfolk & Western engine No. 2570), 9 (Erie Lackawanna engine No. 1241), and 10 (Erie Lackawanna engine No. 3608).

In addition, plaintiff was permitted to change his testimony concerning the nature of the slack action, and plaintiff was further permitted to amend his claim to allege that the slack action was abnormal and that there should have been air in the train to assist in braking movements (293a l. 16 - 25a l. 16; 307a ll. 16-20). Plaintiff was also permitted to amend his pretrial statement during the course of the trial to set forth these new theories and to name and call Robert Godwin as a witness concerning these new theories (610a - 611a).

At the conclusion of the trial the court charged the jury on both of plaintiff's alleged theories, i.e., a claim based upon the Boiler Inspection Act, 45 U.S.C. Sections 22 et seq., and a claim based upon the Federal Employers Liability Act, 45 U.S.C. Sections 51 et seq. (534a l. 1 - 572 a l. 16). Initially the jury returned a verdict of no cause of action for negligence under the F.E.L.A. (582a l. 25 - 583a l. 1). The jury was then instructed to also consider and reach a verdict on plaintiff's claim based upon the Boiler Inspection Act (583a ll. 2-21). At the jury's request, the court re-read its charge in regard to the Boiler Inspection Act claim (586a l. 4 - 590a l. 4), and then, after further deliberation, the jury returned a verdict of no violation of the Boiler Inspection Act in regard to the placement of the brake valve or the defective seat (591a ll. 6-10).

Judgment on the verdict was entered on October 14, 1976.

Summary of the Argument

Plaintiff-appellant's claims of reversible error are without merit in fact or law. Contrary to plaintiff's assertion, the trial court properly found that the defendants had adequately responded to plaintiff's subpoenas duces tecum under all of the circumstances and that the defendants' difficulty in responding to the subpoenas resulted solely from plaintiff's late, untimely, and improper service of the subpoenas. The trial court properly exercised its discretion in denying plaintiff's "request" for a continuance, particularly in view of the fact that the defendants had already produced the most relevant and timely locomotive inspection reports sought by plaintiff.

The entire record of the trial court's charge fully demonstrates that the court properly charged the jury on plaintiff's two alleged theories of recovery, and plaintiff's assertions of error on the applicable law are wholly without merit. In addition, the trial court did not err or abuse its discretion in refusing to use the precise language of plaintiff's request to charge or in refusing plaintiff's request for written interrogatories to the jury.

The trial court properly exercised its discretion in excluding plaintiff's proffer of the testimony of Harold Parker in view of the fact that Mr. Parker's testimony involved an incident which was remote in time and involved a completely different condition of the subject locomotive seat.

While the trial court did characterize some of plaintiff's evidence as "slim," it did properly caution the jury regarding its comments on the evidence, and, in fact, the court instructed the jury that they could find for the plaintiff even though some of plaintiff's evidence was slim.

POINT I

THE DISTRICT COURT DID NOT ERR IN ITS RULING CONCERNING PLAINTIFF'S TWO SUBPOENAS DUCES TECUM AND PLAINTIFF'S "REQUEST" FOR A CONTINUANCE

Plaintiff claims to have properly served each of the defendants with a subpoena duces tecum requiring the production of a multitude of records, including wage and work records for the years 1969 through 1976, wage agreements for the years 1971 through 1976, all inspection and repair or work reports concerning Norfolk & Western engine No. 2500 for the year 1971, accident and repair reports concerning one Harold Parker, a yard map or diagram of the Bison Yard, all photographs taken by the defendants in regard to the plaintiff's injury claim, all statements obtained by the defendants in the course of their investigation of plaintiff's injury claim, all written agreements between the defendants in effect as of the date of the incident at issue (Appendix E, 606a - 609a).

The subpoenas themselves do not have an executed affidavit of service and there was no testimony as to when, how or to whom the subpoenas were served (Appendix E, 606a - 609a; 426a ll. 1-18), except for plaintiff's counsel's claim that they were served upon "the superintendent of the railroad"

(425a ll. 24-25; 426a ll. 15-16). The statements of plaintiff's counsel merely indicate that at most, one superintendent for a railroad was served at the Bison Yard. At the time the subpoenas were served the Erie Lackawanna had no employees working in the City of Buffalo or at the Bison Yard (426a ll. 17-18).

The extended colloquy concerning the defendants' response to these subpoenas (332a l. 25 - 387a l. 13) and the testimony of Jack T. Burchard, ConRail Claim Agent, concerning the defendants' efforts to respond to the subpoenas demonstrated that:

(1) the subpoenas were received by Mr. Burchard and defendants' counsel on October 4, 1976 (388a ll. 22-23), and the trial commenced on October 5, 1976;

(2) Mr. Burchard arranged to obtain certain wage records by special delivery from Cleveland, Ohio (389a ll. 6-13), he searched for and obtained a diagram of the Bison Yard (389a ll. 2-5), and he searched through twelve boxes of records at the Bison Yard office for inspection or work reports concerning Norfolk & Western engine No. 2500 for the year 1971 (389a l. 14 - 392a l. 7);

(3) none of the records requested in the subpoenas had been requested or searched for prior to the receipt of the subpoenas or prior to or during the course of the first trial of this action (394a ll. 18-25).

(4) the defendants produced all inspection reports (approximately twenty-eight in all) for engine No. 2500 for

the year 1971 to the extent that such records were available from the Buffalo terminal (397a l. 2 - 402a l. 11);

(5) a number of the documents requested in the subpoenas are privileged work product and not subject to production (376a ll. 1-21).

Plaintiff, in his brief, has randomly abstracted certain portions of this colloquy concerning the defendants' response to the two subpoenas. Those abstractions and the manner in which they are set forth in plaintiff's brief are grossly misleading and taken completely out of context. Plaintiff's misleading and deceptive misuse of these out-of-context abstractions from the colloquy serve only to demonstrate the poverty of plaintiff's argument. The trial court also noted a similar problem concerning plaintiff's misstatement of the record in addressing plaintiff's counsel, Mr. Collins, Sr., during the course of part of that colloquy (381a ll. 10-22). See, also, the trial court's comments at 380a ll. 3-20.

Following the extended colloquy, the court found as follows (402a l. 19 - 404a l. 17):

> THE COURT: We have come to a lot of the essence of the problem, Mr. Collins, when we refer to the time factor. The subpoena duces tecum was dated last Friday, the 1st, and, if I understand, served on Mr. Griffin on that same day, very untimely and on short notice, when you consider the fact that this trial had been set for October 5 since August 23, 1976 and, consequently, if there had been any dilemma in the totality or lack of totality of the response, I think it may be blameable upon that short notice, rather than anything else. Beyond

> that, while it may well be possible that there are inspection reports for engine 2500 that might be in Conneaut or some place else, or Hornell, I don't really see any such would be probative. We know that the engine was here. We are fortunate enough to have for the jury's consideration the inspection report of this shift practically immediately before Mr. Eggert's shift on June 21 and June 22, 1971, which is perhaps the most probative piece of paper that we would have, and also there is some inference to be drawn from the fact that eight out of seventeen of the inspection reports that are comprised in Exhibit 38(a) are from Buffalo, and the others are from outside of Buffalo. Now, there is a strong implication there, as far as I am concerned, that the great percentage of all the whole routing or all the terminal of Norfolk & Western might well have found their way into these twelve boxes here in the Norfolk & Western yard. At least, we know that we have culled - not only have we culled those that were made here, the Buffalo inspection reports, but we have caught up with the Belleview and Conneaut and seven others from outside Buffalo for that first period of 1971, pre-accident. Consequently, I am satisfied with the production of the defendants in this case, although it might be well to warn defendants in the future that if they are hit with something they can't comply with, they might seek relief or make any other objection they properly can, or ought to to protect their situation.

The court properly determined that the most relevant, probative and pertinent reports, i.e., the June 21 and 22, 1971 reports, had been produced. The court's further determination that the defendants adequately responded to the subpoenas under all of the circumstances is fully supported by the record. The cases cited in plaintiff's brief at pp. 18-19 have no application under the instant facts. Plaintiff had a full and fair opportunity prior to the retrial of this action to request the

production of the records sought in the two subpoenas. Plaintiff, however, never filed or served any such request.

Plaintiff's sole "request" for a continuance was for the purpose of allowing the defendants to search for any inspection or repair records maintained at the Erie Lackawanna's major repair shop in Hornell, New York (410a ll. 17-25). However, when it was pointed out that a seat repair was not a major repair and that the engine involved was a Norfolk & Western engine which would never be sent to the Erie Lackawanna's Hornell shop for repairs (411a ll. 1-11), plaintiff abandoned the request for a continuance and requested that the June 21, 22 and 23 inspection reports already in evidence be excluded. At the same time, plaintiff's counsel indicated that they were prepared to proceed with the trial at that time (413a ll. 8-11).

In all cases, the grant or denial of a request for a continuance is within the sound discretion of the trial court, and the denial of plaintiff's request for a continuance, if, in fact, there was such a request and a denial thereof, should not be upset in the absence of a clear showing that the trial judge acted arbitrarily. See, Fulton v. Coppco, Inc., 407 F.2d 611 (10th Cir. 1969), where the court upheld the district court's refusal to grant a continuance to allow further discovery where the identical issue had been raised in a prior case. See, also, Davis v. United Fruit Co., 402 F.2d 328 (2d Cir. 1968), cert. den. 393 U.S. 1085 (1969).

Finally, the trial court's refusal to grant a continuance did not prejudice plaintiff in any respect since the jury

ultimately found that the seat at issue was defective. The foreman of the jury in reporting the verdict stated (591a ll. 7-10):

> After carefully reviewing the evidence, we find no violation of the Boiler Inspection Act in regard to the placement of the brake valve and defective seat. [Emphasis added.]

Plaintiff claims that the court denied him the right to put the March 6, 7, 9 and 11 inspection reports into evidence and refused to allow plaintiff to call one Harold Parker for the purpose of giving testimony concerning an accident involving Mr. Parker on March 11, 1971 on the same Norfolk & Western engine some three months before the incident in question. The trial court, after reviewing the Parker accident report, the March inspection report, and the direct testimony of Mr. Eggert, noted that the alleged defect involved in the Parker incident had been repaired prior to the Eggert incident (359a ll. 20-24). The trial court then ruled that the proffered testimony of Mr. Parker was inadmissible because it was too remote in time and because it involved a completely different situation (383a ll. 19-21).

Evidence, even if relevant, may be deemed inadmissible because of remoteness, undue prejudice or confusion of the issues. Such matters are within the discretion of the trial judge. Smith v. Spina, 477 F.2d 1140, 1146 (3d Cir. 1973). In an F.E.L.A. claim, the admissibility of proffered evidence of matters prior to the event in question is within the discretion of the trial judge. Barbuscia v. Reading Co., 295 F.2d 236

(3d Cir. 1961). In determining the admissibility of proffered evidence of prior or subsequent conditions, the court should look to the time elapsed and the likelihood of a change in the condition, and absent an absue of discretion, the trial court's decision should not be disturbed on appeal. Manning v. New York Telephone Co., 388 F.2d 910, 912 (2d Cir. 1968).

The trial court's refusal to admit the proffered testimony of Mr. Parker was proper and not an abuse of its discretion, particularly in view of the fact that three months had elapsed since the Parker incident and the testimony of Mr. Eggert showed that the alleged defect in the seat involved in the Parker incident had been repaired prior to the Eggert incident.

Plaintiff also claims that he was not afforded an ample opportunity to attempt to discredit the reliability of the June 21 and 22 inspection reports. However, Mr. Eggert testified at length concerning the condition of the seat and the normal situation in which he, as an engineer responsible for filing such reports, would report a defect. The jury was, therefore, given ample evidence to determine whether the June 21 and 22 inspection reports were reliable, and, in fact, as quoted supra, the jury found that the seat was defective. Implicit in the jury's verdict was the finding that the defective seat was not a cause of Mr. Eggert's injuries. Plaintiff has, therefore, suffered no prejudice as a result of the trial court's rulings.

The alleged "background" material set forth in plaintiff's brief is wholly inaccurate, unsupported by any evidence in the record, and warrants no further response. The mere allegations contained therein should not and cannot be properly considered by this Court.

POINT II

THE DISTRICT COURT DID NOT ERR IN ITS CHARGE TO THE JURY

Plaintiff in this action advanced two separate theories of recovery, i.e., (1) a violation of the Boiler Inspection Act, and (2) negligence under the F.E.L.A. The trial court charged the jury on these two separate theories (539a l. 22 - 540a l. 5).

In order to recover on a claim brought under the Boiler Inspection Act, an employee must prove a violation of that act and that his injury resulted from or was caused by the alleged violation. Lilly v. Grand Trunk Western R.R. Co., 317 U.S. 481, 485 (1943). In Carter v. Atlanta & St. Andrews Bay Railway Co., 338 U.S. 430 (1949), involving an employee injury claim arising out of an alleged violation of the Safety Appliance Act, the Court stated, 338 U.S. at 434-35:

> Once the violation is established, only causal relation is in issue. And Congress has directed liability if the injury resulted 'in whole or in part' from defendant's negligence or its violation of the Safety Appliance Act. We made clear in Coray v. Southern Pacific Co., [335 U.S. 520 (1949)], 335 U.S. at 523, that if the jury determines that the defendant's breach is 'a contributory proximate cause' of injury, it may find for the plaintiff.

In Carter there was a two-pronged theory of recovery, and recovery was sought under either the Safety Appliance Act

or the F.E.L.A., 338 U.S. at 434. The Court held, Id.:

> In this situation the test of causal relation stated in the Federal Employers Liability Act is applicable, the violation of the Appliance Act supplying the wrongful act necessary to ground liability under the F.E.L.A.

The Court further noted in Carter that, although violations of the Safety Appliance Act had sometimes been characterized as "negligence per se," "that term is a confusing label for what is simply a violation of an absolute duty." Id. This rule is also applied where an employee seeks to recover under the Boiler Inspection Act. See, for example, Holfester v. Long Island Railroad Co., 360 F.2d 369 (2d Cir. 1966); Bolan v. Lehigh Valley R. Co., 167 F.2d 934, 937 (2d Cir. 1948).

The trial court charged the jury in the following manner concerning plaintiff's Boiler Inspection Act claim (541a l. 13 - 542a l. 25):

> The statute does not make the defendant railroads the guarantors of the safety of their employees, and the plaintiff is not entitled to an award of damages simply because he was injured. In order to recover he must prove that there was a violation of the statute by the defendants or either of them, and that his injury was caused in whole or in part by that violation. If he proves by a preponderance of the evidence that either defendant violated the statute and that the violation contributed to his injury, he is entitled to recover even though the railroad exercised care and was not negligent, and even though the plaintiff was guilty of negligence contributing to the occurrence, or with knowledge of the violation, continued to work on the locomotive. The statute is violated when a locomotive is operated in an unsafe condition, that is, when it is used in a condition which presents an unnecessary peril to life or limb, and it is for you to determine whether the front seat was defective and whether the presence of such seat or the arrangement of the emergency brake valve was a violation of the statute. If you find that the statute was not violated, or that although it was, such violation played no part whatsoever in causing plaintiff's injury, then your verdict would be for the

> defendant railroads. If, on the other hand, you find the statute was violated, and that plaintiff's injury was caused in whole or in part by such violation, your verdict would be for the plaintiff, and you would proceed to consider the question of damages.

See also the trial court's charge at 586a l. 17 - 590a l. 4.

In an employee injury claim brought under the F.E.L.A., the test of a jury case is whether the employer's negligence played any part, even the slightest, in causing the injury for which recovery is sought. Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500, 506 (1957). The court therein further stated in reference to 45 U.S.C. Section 51, 352 U.S. at 507:

> The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence.

The trial court in this action properly charged the jury in regard to plaintiff's negligence claim under the F.E.L.A. (543a l. 1 - 554a l. 25). In particular, the trial court charged the jury as follows (548a ll. 16-25):

> Note, however, that it does not matter how slight the negligence, if any, on the part of a defendant railroad might have been. If you find there was any negligence on the part of the defendant railroad and that that negligence wholly or partially caused the incident which produced the plaintiff's injuries, you should find that the defendant is negligent as a part of your verdict.

See also the trial court's charge at 550a ll. 14-19.

After giving its charge on plaintiff's two theories of recovery, the trial court again stated (552 a ll. 9-13):

> I must remind you that if you find the defendants were liable on the basis of a violation of the Boiler Inspection Act, you do not consider any negligence by the plaintiff resulting in his injury.

The complete record of the trial court's charge fully demonstrates that that charge was proper and free of error. If there has been any misstatement or obfuscation of the trial court's charge as claimed by plaintiff in his brief, that misstatement and obfuscation has been created and is contained solely in the random abstractions of the court's charge contained in plaintiff's brief in such manner and form as to grossly misstate and misrepresent the charge actually given by the court to the jury.

POINT III

THE DISTRICT COURT DID NOT ERR IN EXCLUDING PLAINTIFF'S PROFFERED EVIDENCE

Contrary to plaintiff's assertion, this Court, in remanding this case for a new trial, Eggert v. Norfolk & Western Railway Company, 538 F.2d 509, 512 (2d Cir. 1976), stated:

> The district court also erred in excluding evidence which tended to establish plaintiff's claim, set forth in his complaint and interrogatories, that had there been a guard over the brake valve on which he struck his knee, the injury would not have occurred or would not have been as serious as it was.

The trial court allowed plaintiff to offer such evidence. In addition, the trial court, over the defendants' strenuous objection, permitted the plaintiff to again amend his claim during the course of trial to allege two new grounds for negligence, i.e., that the slack action was abnormally severe and that there should have been air in the train to assist in braking movements. See Point I supra.

Plaintiff proffered the testimony of one Harold Parker for the alleged purpose of giving testimony concerning the condition of the subject seat on the Norfolk & Western locomotive in early March of 1971, some three months prior to the incident involving Mr. Eggert on June 22, 1971. The court reviewed the accident report involving Mr. Parker and the locomotive inspection reports for March 6 through March 11, 1971. The allegation involved in the Parker incident was that the left front seat of the engine was completely missing (331a ll. 16-24; 355a ll. 11-19). After reviewing Mr. Eggert's testimony concerning the condition of the left front seat on June 21 and June 22, 1971, the court properly concluded that the seat must have been repaired prior to the Eggert incident and that the condition of the seat on June 22, 1971 was completely different than the situation involved in the Parker incident in March of 1971 (356a ll. 10-11; 359a ll. 3-12; 359a l. 20 - 360a l. 4). The trial court, therefore, properly determined that the proffered Parker testimony was too remote in time and irrelevant because of the undisputed changed condition of the seat (383a ll. 19-20). See, Manning v. New York Telephone Co., 388 F.2d 910, 912 (2d Cir. 1968).

Plaintiff also claims that the proffered Parker testimony should have been admitted to show the unreliability of the June 21 and 22, 1971 locomotive inspection reports. However, Mr. Eggert himself testified that he would not have reported the condition of the seat in a locomotive inspection report, if he made such a report on June 22, 1971 (225a l. 25 - 226a l. 23).

In addition, Mr. Eggert testified at length concerning the alleged condition of the seat on June 22, 1971. The jury had ample evidence to consider in weighing the reliability of the inspection reports.

Plaintiff was not prejudiced in any way by the refusal to admit the proffered Parker testimony to show the unreliability of the June 21 and 22 inspection reports which did not report any defect in the seat because the jury actually found that the seat was defective (591a l. 10).

The trial court, therefore, properly exercised its discretion in excluding the proffered testimony of Mr. Parker. Manning v. New York Telephone Co., supra. Even if the district court erred in excluding that testimony, plaintiff was not prejudiced thereby, and the error, if any, was harmless.

POINT IV

THE DISTRICT COURT DID NOT ERR IN REFUSING PLAINTIFF'S REQUEST TO CHARGE OR IN REFUSING PLAINTIFF'S REQUEST FOR INTERROGATORIES TO THE JURY

The trial judge is not required to deliver his instructions concerning the applicable law in the specific words requested by either party or in the exact language of any applicable statute or opinion. The trial judge is required to state the substance of the applicable laws so that the jury may apply the facts thereto. Halecki v. United New York and New Jersey Sandy Hook Pilots Association, 282 F.2d 137, 140 (2d Cir. 1960), cert. den. 364 U.S. 941 (1961). An examination of the trial court's charge demonstrates that the court properly charged the

jury with regard to the law applicable to plaintiff's claim. See, Point II supra. The trial court, therefore, did not err in refusing to charge the jury using the exact language requested by plaintiff.

Flour Corp. v. Blake, 338 F.2d 830 (9th Cir. 1964), cited by plaintiff, has no application in this case in that the question posed therein was whether the trial court erred in referring to a state safety code in its charge to the jury concerning the duty of care imposed upon the defendant in that case.

Under Rule 49(b) of the Federal Rules of Civil Procedure, interrogatories to the jury are permitted but not required. The long applied rule is that a trial court's decision not to use written interrogatories to the jury is within the court's discretion. See, for example, DeMauro v. Central Gulf S.S. Corp., 514 F.2d 403, 405 (2d Cir. 1975); Skidmore v. Baltimore & Ohio R. Co., 167 F.2d 54 (2d Cir. 1948), cert. den. 335 U.S. 816 (1948). The trial court's refusal to use written interrogatories to the jury was a proper exercise of its discretion.

The cases cited in plaintiff's brief on this point are inapposite in that in each case special interrogatories were used and questions were raised on appeal as to the sufficiency or propriety of the interrogatories used or as to the correctness of the verdicts rendered as a result thereof.

POINT V

THE DISTRICT COURT DID NOT ERR IN CHARACTERIZING PLAINTIFF'S EVIDENCE AS SLIM

In the federal courts, the trial judge in a jury case is not simply a moderator. He is expected to summarize the evidence for the jury, and he is permitted to comment on the evidence if he chooses. In commenting on the evidence, the trial judge is not permitted to impose his own opinions on the jury, add facts or present his own theories. See, for example, Ah Lou Koa v. American Export Isbrandtsen Lines, Inc., 513 F.2d 261, 263 (2d Cir. 1975), and cases cited therein.

In his charge, the trial judge commented that plaintiff's evidence regarding the slack action and air in the train was "slim." In each instance, however, the court commented that, if the jury found the evidence believable, they could find the defendants liable in damages to the plaintiff (554a ll. 12-18; 554a l. 25 - 5555a l. 11).

In addition, the court stated in its charge (538a l. 19 - 539a l. 21):

> You are not to take any factual statement that I have made or may make, or any of the statements of fact which have been made or alluded to by any of the attorneys in the case, as binding upon you in any way. If I point out some facts, it may be that some are clearly beyond dispute, and others are in dispute, and you have the duty, consulting with one another, to determine those factual issues where the evidence leaves room for argument. My job is to tell you what the law is, and you are bound by my declaration of the law. I have tried to preside impartially and not to express an opinion one way or another as to what you should find the facts to be. I have had to rule from time to time on the admissibility of evidence and on motions, as they were made in regard to the applicable law, but you are not to infer from any such ruling that I have made or from anything that I have said in

the course of the trial that I have any views for or against any of the parties to the lawsuit and, in any event, any views of mine would be totally irrelevant because your recollections of the evidence and your determination of the issues are what control.

And, again, at 564a ll. 15-24, the court stated in its charge:

> I stress again that you are to find the facts, and any examples or factual indications that I have given do not indicate any opinion on my part as to how you should find on any issue or whether you should award any damages against the defendants. These matters are solely for your decision, and I have no part in making that decision, other than to tell you what the governing law is.

These statements are in substance the same as those set forth in the charge of the court in Brewster v. Boston Herald-Traveler Corp., 188 F.Supp. 565, 567 (D.Mass. 1960), relied upon by plaintiff in his brief.

The trial court's comments on plaintiff's evidence were permissible, and the court properly cautioned the jury in regard thereto.

CONCLUSION

The defendants-appellees, the Norfolk & Western Railway Company and the Erie Lackawanna Railway Company, respectfully urge this Court to affirm the judgment on the verdict in this action.

Dated: Buffalo, New York
May 27, 1977

Respectfully submitted,

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STATE OF NEW YORK
COURT : COUNTY OF
UNITED STATES COURT OF APPEALS: SECOND CIRCUIT

THOMAS W. EGGERT

Plaintiff-Appellant

-vs-

NORFOLK & WESTERN RAILWAY COMPANY
ERIE LACKAWANNA RAILWAY COMPANY

Defendants-Appellees

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF E R I E : SS.
CITY OF BUFFALO)

DONNA PILECKI , being duly sworn, deposes and says that she is a mail clerk in the offices of Moot, Sprague, Marcy, Landy, Fernbach & Smythe, the attorneys for the above named Defendants-Appellees herein. That on the 27th day of May , 1977, she served the within Brief for Defendants-Appellees upon John F. Collins, Esq. , the attorney for the above named Plaintiff-Appellant, by depositing two true copies ~~xxxxxxxxxx~~ of the same securely enclosed in a postpaid wrapper in a Post Office box regularly maintained by the United States Government at Buffalo, New York, in said County of Erie, directed to said attorney for the Plaintiff-Appellant 464 Statler Hilton Hotel at Buffalo, N.Y., that being the address within the State designated by him for that purpose upon the preceding papers in this action, or the place where he then kept an office, between which places there then was and now is a regular communication by mail.

Deponent is over the age of eighteen years.

Donna Pilecki

Subscribed and sworn to before me
this 27th day of May, 1977

Diana A Hajduk

DIANA A. HAJDUK
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19 78